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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 851 ~~407~~

STANDARD OIL COMPANY,

Petitioner,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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June 9, 1949.

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Jewel Tea Co. v. Williams, 1941, C. C. A. 10th, 118 F. 2d 202 ..... (7)

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Standard Oil Company, respectfully prays for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit to review a decree of that Court (R. 5307-10) entered April 29, 1949, modifying a cease and desist order issued by the Federal Trade Commission August 9, 1946 (R. 5254) and affirming and enforcing said order as modified. A certified transcript of the record in this case, including the proceedings in said Court of Appeals, is furnished herewith in accordance with Rule 38 (1) of the Rules of this Court.

OPINION AND DECREE BELOW.

This is the first proceeding in which a Federal agency or a Federal Court has denied a seller the right to meet competition in good faith by reducing his price to an individual customer to meet a price offered to the customer by a competitor. Such a price reduction—admittedly made in good faith to retain the business of that customer—was held to be a price discrimination violative of Section 2 of the Clayton Act as amended because of its effect on competition among retailers, despite the proviso of Section 2(b) thereof:

> "*Provided, however,* that nothing contained herein shall prevent a seller rebutting the prima facie case thus made by showing that his lower price * * * to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor * * *."

The court below also sustained the Commission on two other contested issues (R. 5293-5305, 173 F. 2d 210) for which review is sought:

> The Federal Trade Commission has jurisdiction of a price discrimination case under Section 2 only "* * * where either or any of the purchases involved in such discrimination are in commerce * * *". The court held that the purchases in the State of Michigan involved in the alleged discrimination were "in commerce" although fulfilled by delivery out of a local Michigan storage terminal where the gasoline had been at rest for several months.
>
> The court prohibited petitioner from selling to a wholesaler at a lower price than petitioner sells to retailers in the same territory when petitioner knows or "has reason to know" that the wholesaler intends to resell to his retailer customers at a price less than petitioner sells to its own retailer customers.

THE MATTER INVOLVED.

Petitioner's business in the State of Michigan consisted solely of the sale and distribution of petroleum and related products. This case is exclusively concerned with petitioner's sale of gasoline to two classes of customers in the Detroit region: (a) to a varying number of retail service station operators buying in small tank *wagon* quantities; and (b) to four jobbers* buying in larger tank *car* quantities. The functional difference between a retail service station operator and a jobber is outlined in the margin.**

These jobbers were supplied with petitioner's gasoline out of its Marine Terminal near Detroit; the service stations were supplied out of the Terminal or out of petitioner's six Detroit bulk plants which were in turn supplied from the Terminal. Petitioner sold and delivered gasoline in tank car quantities to the four jobbers at its regular tank car price, which, in the case of its largest selling brand, was 1½¢ per gallon lower than the regular tank wagon price at which it sold and delivered in smaller quantities to the service stations (R. 116). This price differential or jobber margin was held to be unlawful price discrimination. Similar or larger jobber margins were available to all jobbers at all times from other suppliers of comparable gasoline (R. 127, 1063-4, 1092, 1893).

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* Stikeman Oil Company; Wayne Oil Company; Citrin-Kolb Oil Company; Ned's Auto Supply Company (R. 113).

** Retail service stations have limited storage capacity and cannot receive deliveries in excess of a "tank *wagon*" quantity. Jobbers, however, maintain large bulk storage plants, equipped to take large deliveries in "tank *car*" quantities, which they, in turn, deliver to retail service stations. Jobbers also differ from retail service stations in that they operate their own tank wagons for making deliveries to service stations, buy a large minimum annual gallonage, and are accorded a tank car price which is necessarily lower than the tank wagon price at which they sell to retailers. Some jobbers also operate service stations of their own (R. 119, 934, 1890-1, 5098).

The practices of the four jobbers varied. Stikeman and Wayne sold almost entirely at wholesale and always at the prevailing tank wagon price (R. 5166-7). Citrin resold almost entirely at wholesale and always at the prevailing tank wagon price, except in the case of Langer-Cohn, a retailer to whom Citrin accorded a discount, and in the case of one other customer who received a discount for a brief time. Citrin resold at retail for a short period at one of its own service stations at less than the prevailing service station price (R. 5166). Ned's resold entirely through its own retail service stations, frequently at prices below the prevailing service station price (R. 5167). Petitioner has never in the past made any attempt to control its customers in respect of their resale price (R. 196-8).

The court found that the differential between tank car and tank wagon price accorded by petitioner to Ned's and Citrin and the discount allowed by Citrin to Langer-Cohn were eventually passed on to the public in the form of service station prices lower than those generally prevailing; that this resulted in some loss of patronage by service station operators who tried to maintain the higher price to the public and compelled some service station operators to reduce their price to the public; and that the tank car differential constituted a price advantage which, because of this sequence of events, was injurious to competition at the retail level (R. 5297, 5302).

Facts Relating to the Defense of Meeting in Good Faith the Lower Price of a Competitor.

The evidence was conclusive, and it was assumed both by the Commission and by the court below (R. 5297, 5299, 5302), that the tank car price was accorded to each of the four jobbers by petitioner in good faith to meet an equally

low price proved to have been specifically offered each of them by other suppliers of gasoline of comparable grade and quality. Petitioner had already lost three jobber customers to competitors because it had failed to meet the lower prices offered them by such competitors (R. 1912-6); and, during the period complained of, competitors were trying to take away petitioner's four remaining jobber customers by quoting tank car prices even lower than petitioner's regular tank car price (R. 5096, 5104). Not only was petitioner warranted in believing it would have lost these jobber customers to competitors had it not quoted the price here complained of (R. 1893, 5098, 5104; Mason R. 5262, 5264), but it would in fact have lost the four jobbers as customers had it not met, in whole or in part, the specific lower prices offered them by designated competitors (R. 5121, 5122, 5104). Petitioner never undercut the prices offered by competitors to its four jobber customers.

The distribution of gasoline is highly competitive in the Detroit region. These four jobbers, operating their own bulk storage and delivery facilities, will be able, in the future as in the past, to continue to buy at a tank car price, as low or lower than petitioner's tank car price, from other suppliers of branded gasoline comparable in grade and quality to petitioner's (R. 948, 1062-3, 1893). Suppliers distributing only through jobbers* in the Detroit region (irrespective of their practice in other regions) can and will sell to these particular four jobbers in tank car quantities at a tank car price even lower than petitioner's, and, inasmuch as they will be selling at one price only, they will be entirely beyond the reach of Section 2 of the Clayton Act as amended and the Commission will be without power to

* In certain localities some suppliers of gasoline, comparable in grade and quality to petitioner's, distribute only by tank wagon delivery to retailers (R. 1622, 945-6); others only by tank car delivery to jobbers or wholesalers (R. 971, 1092-3); and others, as petitioner, by both methods (R. 971, 1020, 1622).

proceed against them regardless of the prices at which their customers might resell at wholesale or retail (R. 1092-3).

The sole reason advanced for depriving petitioner of its right in good faith to meet the price of a competitor is that the Commission and the court deemed that petitioner's exercise of that right produced results injurious to competition at the retail level (Com. R. 5170-1, 5179; Op. R. 5302-3). If the Decree should be permitted to stand, there will be no rectification of the so-called injury to competition at the retail level; the four jobbers will be in a position to obtain the tank car differential from suppliers distributing in the Detroit region through jobbers only and to pass on to their customers a portion of such differential.

Facts Relating to Jurisdiction: Were the Purchases Involved in This Case "in Commerce"?

All of the gasoline sold by the petitioner in the Detroit region came from petitioner's Marine Terminal, at River Rouge, Michigan, which had a storage capacity of some 63,000,000 gallons (R. 185-6, 5062-3). Gasoline was shipped by petitioner's lake tankers from its Whiting, Indiana, refinery during the summer months and stored in the Terminal to supply the estimated fluctuating demands of existing and prospective customers throughout the year and particularly during the winter months when lake navigation was closed (R. 186). Shipments of gasoline were commingled in tanks at the Terminal with stocks of the same grade previously received and stored there (R. 186, 188), became part of the mass of property in the State, and State taxes were paid thereon (R. 194-5). None of the gasoline stored in the Terminal was earmarked for or destined to any given customer (R. 186). Although petitioner had various activities in other Mid-West States,

none of the gasoline stored in the Terminal was transported or sold out of the State of Michigan (R. 188).

Approximately half of the gasoline stored at the Marine Terminal was delivered to the jobber and service station customers of petitioner and the rest to its consumer customers (R. 4776). Delivery was made to the service stations by tank wagon trucks owned and operated by petitioner, either out of the Terminal or out of the six large bulk plants maintained by petitioner in Detroit (R. 108-9, 121-2). Deliveries out of the Terminal to petitioner's and jobbers' bulk plants were made in tank car quantities by tank cars or transport trucks owned and operated by common carriers (R. 108, 113, 186-7). The jobbers in turn delivered to their customers in smaller quantities by tank wagon trucks owned and operated by them (R. 1891). No direct shipments were made from petitioner's Whiting, Indiana, refinery either to the service stations or to the four jobbers except six tank cars shipped to the jobbers in an emergency during the month of April, 1939 (R. 122, 4717-26).

No shipments to the Marine Terminal were made in response to prior orders of jobbers or service stations (R. 186). Neither jobbers nor service stations were required by contract or understanding to purchase any designated amount of gasoline from petitioner. Neither jobbers nor service stations were required by contract or understanding to deal exclusively in petitioner's brands of gasoline (R. 116, 162, 4702, 4713); some, in fact, handled Ford Benzol gasoline (R. 222, 467, 470).

Orders for gasoline were given by the jobbers and the service station dealers to petitioner's Detroit office, to the Marine Terminal, to tank wagon drivers or to salesmen. None was given to any office of petitioner outside the State of Michigan (R. 191-3). All payments were collected in

Michigan and deposited in Michigan banks. Michigan taxes were paid on all property in Michigan, including land, buildings, inventory at the Marine Terminal and bulk plants, bank account, and on sales where due (R. 192-3, 194-6).

JURISDICTION TO REVIEW.

Jurisdiction of this Court is invoked under Title 28, United States Code, Sections 1254(1) and 2101. The decree of the Court of Appeals for the Seventh Circuit to be reviewed was entered April 29, 1949 (R. 5307-10).

THE QUESTIONS PRESENTED.

1. Whether the Commission, under Section 2 of the Clayton Act as amended, may deprive a supplier of the right to retain a jobber customer by meeting in good faith the lower price offered such customer by a competing supplier where the Commission deems that the effect thereof has been injurious to competition at the retail level.

2. Whether Section 2 of the Clayton Act as amended, construed to deprive a supplier of this basic right, contravenes the due process clause of the Fifth Amendment.

3. Whether "either or any of the purchases involved in" the discrimination (*i.e.*, the purchases of the jobbers on the one hand or of the service station operators on the other) are "in commerce" as required by Section 2(a) where such purchases are made wholly within the state, and are filled from stocks stored for long periods of time

in a local marine terminal but not shipped there in response to previous orders.

4. Whether a supplier of gasoline, selling both to wholesalers and retailers in the same area, may be required to enter into a price maintenance program by an order to cease and desist from selling to a wholesaler who, the supplier knows or has reason to know, intends to resell to his retailer customers at a price below that at which the supplier sells to its own retailer customers.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. The lower court's denial of the right of a supplier to reduce its prices to certain customers in good faith to meet equally low prices offered them by competitors (a) is of prime significance in connection with laws regulating competition and of great importance to all industry, large and small; (b) is apparently contrary to a decision of the Court of Appeals for the Second Circuit; and (c) is, we believe, in conflict with the principles laid down by this Court in price discrimination and other cases.

2. Section 2 of the Clayton Act as amended, as construed by the court below, contravenes the due process clause of the Fifth Amendment, especially in view of the fact that the only practical consequence of the Decree will be to transfer the patronage of petitioner's jobber customers to other suppliers without changing competitive conditions at the retail level. The constitutionality of the Act, thus construed, is a question of great consequence, never passed upon by this Court.

3. The decision below that the purchases by the jobbers and service stations were "in commerce", on the ground that storage in a local gasoline terminal differs essentially, if not in principle, from storage in a local merchandise warehouse, (a) is of vital importance to the oil industry, (b) has been decided otherwise by other Courts of Appeals, (c) and is apparently in conflict with opinions of this Court.

4. The decision of the court below modifying Paragraph 6 of the Order to require a supplier to cease and desist from dealing with a wholesaler when such wholesaler "to the knowledge of" the supplier, "or under such circumstances as are reasonably calculated to impute knowledge" to the supplier, resells or intends to resell the gasoline to his retailer customers at a price less than the supplier's price to its own retailer customers, (a) will require the establishment of price maintenance programs, (b) will jeopardize the businesses of independent wholesalers functioning as merchandisers, and (c) will entail basic alterations of marketing procedures, which should not be required without previous review and consideration of this Court.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court, directed to the United States Court of Appeals for the Seventh Circuit, sitting at Chicago, Illinois, commanding said court to certify and send to this Court, on a day to be designated, a full and complete transcript of the record and of all proceedings heretofore had in said Court of Appeals in this cause, to the end that this cause may be reviewed and determined by this Court; that the decree of said Court of Appeals be reversed and set aside;

and that the petitioner be granted such other and further relief as may seem proper.

STANDARD OIL COMPANY, a corporation,
Petitioner,

By .....

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June 9, 1949.

BRIEF.

I.

The present is the first and only case in which the Federal Trade Commission or the judiciary has held that a manufacturer, distributor or seller may not reduce his prices in specific instances for the sole and only purpose of meeting competitors' prices and thus retaining his own customers.

The ruling below (R. 5293-5305) that a supplier may not in good faith meet the prices of his competitors when the Commission concludes that the effect on competition is injurious is in conflict with *Federal Trade Commission* v. *Staley Mfg. Co.*, 1945, 324 U. S. 746, and *Corn Products Refining Co. et al.* v. *Federal Trade Commission*, 1945, 324 U. S. 726.

In the *Staley* case this Court held that the basing point system of pricing constituted price discrimination which resulted in injury to competition among those who purchased glucose from suppliers and used it in subsequent manufacture. The Court then considered the affirmative defense proffered under the proviso to Section 2(b) and said (p. 750):

> "The sole question we find it necessary to discuss here is whether respondents have succeeded in justifying the discriminations by an adequate showing that the discriminations were made 'in good faith' to meet equally low prices of competitors."

The Court (pp. 750-760) reviewed and discussed the evidence having to do with this defense and finally held that the showing was "inadequate" inasmuch as specific offers by specific competing suppliers to specific customers had

not been proved. This long discussion would have been entirely academic and unnecessary had injury to competition at any level been sufficient to override the defense.

In the *Corn Products* case, where injury to competition among purchasers of glucose was proved, the Court said of the affirmative defense (p. 741):

> "* * * Examination of the testimony satisfies us, as it did the court below, that it was insufficient to sustain a finding that the lower prices allowed to favored customers were in fact made to meet competition. Hence petitioners failed to sustain the burden of showing that the price discriminations were granted for the purpose of meeting competition. Cf. *Federal Trade Commission* v. *A. E. Staley Mfg. Co., post,* p. 746."

Again, the examination of the testimony would have been unnecessary if, as a matter of law, the defense were obviated by the effect on competition.

In *Federal Trade Commission* v. *Cement Institute et al.*, 1948, 333 U. S. 683, the Court said, at p. 727:

> "Most of the objections to the order appear to rest on the premise that its terms will bar an individual cement producer from selling cement at delivered prices such that its net return from one customer will be less than from another, even if the particular sale be made in good faith to meet the lower price of a competitor. The Commission disclaims that the order can possibly be so understood. Nor do we so understand it. * * * It is thus apparent that the order by its terms is directed solely at concerted, not individual activity on the part of the respondents."

Thus the opinion below is in opposition to the *Staley and Corn Products* cases and to the rationale of *Cement Institute*.

The opinion below is also in conflict with the *per curiam* opinion of the Court of Appeals for the Second Circuit in

Samuel H. Moss, Inc. v. *Federal Trade Commission*, 1945, 148 F. 2d 378 (cert. den. 326 U. S. 734, reh. den. 326 U. S. 809), where Judges L. Hand, A. N. Hand, and Clark reviewed and interpreted Sections 2(a) and (b) and said, at page 379, that even where it appears that a seller

> "* * * has lessened, or prevented, competition, the proviso of § 2(b) will still excuse him, if he can show that his lower price did not undercut his competitors, but merely 'met' their 'equally low price'. In short, that is a defense to the violation of § 2(a). This is as we interpret § 2(a) and § 2(b) when read together."

The decision below also appears to be in conflict with that of the Court of Appeals for the Sixth Circuit in *General Shale Products Corp.* v. *Struck Construction Co.*, 1942, 132 F. 2d 425, at 429 (cert. den. 318 U. S. 780).

Actual or "reasonably possible" injury to competition must be present in every price discrimination case (*Corn Products Refining Co., et al.* v. *Federal Trade Commission*, 1945, 324 U. S. 726, 742; *Federal Trade Commission* v. *Morton Salt Company*, 1948, 334 U. S. 37, 46, 50. If injury to competition rebuts the affirmative defense of meeting a competitor's price in good faith, it necessarily follows that the affirmative defense is unavailable in any case and that the proviso to Section 2(b) is without meaning.

The Commission and the Court placed great reliance on the legislative history of the Robinson-Patman Act to sustain their novel interpretation of the proviso to Section 2(b), particularly on the Conference Report and Representative Utterbach's remarks (R. 5180-2, 5300-01). This legislative history was fully considered and appraised in the *Staley* case where the Court said (p. 753) that the change embodied in the language of Section 2(b) with respect to the good faith meeting of competition "* * * was for the purpose of making the defense a matter of

evidence in each case, raising a question of fact as to whether the competition justified the discrimination" (citing the Conference Report and Representative Utterbach). It is difficult to imagine a case where the competition more strongly justified the discrimination than the present one where, as the court below held (R. 5297, 5302), the evidence was conclusive that the lower prices to the four jobber customers were made in good faith by petitioner to meet specific equally low offers of competitors and where the sole purpose was to enable petitioner to retain its customers.

The Commission itself, both before and after this case, has by appropriate provisos in its orders preserved the right in individual cases to meet in good faith equally low prices of competitors, even where actual injury was found (*A. E. Staley Mfg. Co.*, 1942, 34 F. T. C. 1362; *Ferro-Enamel*, February 26, 1946, 42 F. T. C. 36). The Ferro-Enamel order was issued subsequent to the Commission's original Findings and Conclusions in this case (R. 5182).

The position of the Commission is not only at odds with its previous and subsequent orders but is apparently in conflict with the views of the Department of Justice. As recently as January, 1949, a formal report to the Senate Interstate and Foreign Commerce Committee concerning a bill to amend the Clayton Act, signed by Peyton Ford, the Assistant to the Attorney General, states:

> "Section 3 of the bill would amend Section 2(b) of the Clayton Act. The section [Sec. 2b] now permits sellers to justify otherwise forbidden price discriminations on the ground that the lower prices to one set of buyers were made in good faith to meet the prices of a competitor."*

*U. S. Printing Office, "Comparative Absorption of Transportation Costs"; Hearings before a Subcommittee of the Committee on Interstate and Foreign Commerce of the U. S. Senate; 81st Congress, First Session, on S. 236; Jan. 24, 25, 26, and Feb. 18, 1949, p. 320.

The reasoning of the decision below, if allowed to stand, will necessitate a nationwide reconstruction of the marketing procedures not only of the oil industry but of many other industries. The right of a supplier to compete with his competitors by meeting their prices is so fundamental that no restriction should be placed upon it without the review and consideration of this Court.

II.

The interpretation of the court below raises a serious question of the constitutionality of Sections 2(a) and (b) of the Clayton Act as amended by the Robinson-Patman Act.

The right in good faith to meet the lower price of a competitor in order to keep a customer is of first significance in our competitive system. It has never heretofore been denied. In *International Salt Co.* v. *United States*, 1947, 332 U. S. 392, a Sherman Act case, this Court said at p. 399, " * * * Of course, the Clayton Act itself permits one charged with price discrimination to show that he lowered his price in good faith to meet competition." When the case was returned to the District Court, the trial judge modified the decree to allow the defendant to depart from uniform prices "where necessary in good faith to meet competition" (C. C. H. (Trade Regulation) par. 61,128). The right to meet lower prices in individual instances was also preserved in the *Cement Institute* case, *supra*, and was recognized in *Federal Trade Commission* v. *Morton Salt Co.*, 1948, 334 U. S. 37 at 43.

The denial of such a basic right would, we believe, transgress the Fifth Amendment. In *Fairmont Creamery Co.* v. *Minnesota*, 1927, 274 U. S. 1, this Court held unconstitutional a statute of Minnesota which prohibited a buyer of milk from paying a higher price in one locality than

in another after due allowance for cost on the grounds that the statute inhibited the buyer "from meeting local competition by increasing the price only at that place * * *" (274 U. S. at p. 8).

Should the decree of the court below be sustained, the four jobbers would transfer their patronage to other companies supplying comparable gasoline in the Detroit region at the tank car price to jobbers only (R. 1092-3) and who would be beyond the reach of the Commission inasmuch as such suppliers sell at one price only. The jobbers, buying from such suppliers at their tank car price, would therefore be free to cut prices in the future as in the past, with the same effects on competition. The net practical result of this construction of the statute would be to switch petitioner's jobber customers to others. We submit that such a construction would be in contravention of the Fifth Amendment.

III.

The lower court's decision that the storage of gasoline at the Marine Terminal differed from the storage of goods in a local warehouse (Op. R. 5297-8) and hence did not constitute an end of interstate commerce is in apparent conflict with the decision of the First Circuit in *Lipson* v. *Socony Vacuum Corp.*, 1937, 87 F. 2d 265, cert. granted 300 U. S. 651, dism. per stip. 301 U. S. 711, which is an oil case in which the facts were similar with respect to the commerce point.*

* It is also in conflict with *Daly* v. *Citrin*, 1943, Dist. Ct., E. Dist. Mich., 53 F. Supp. 876, which dealt with petitioner's storage at the Marine Terminal involved in this case, and with *Nachman* v. *Shell Oil Co.*, 1945, Dist. Ct., Dist. Md., C. C. H. (Trade Regulation) p. 57758, where local storage of gasoline was held to terminate interstate commerce. See also *Crutchfield* v. *Cherry*, 1947, Dist. Ct., W. Dist. Tenn., 7 W. H. (B. N. A.) 1080; *Williams et al.* v. *Bill Mosier's Inc.*, 1942, Dist. Ct., W. Dist. Okla., 2 W. H. (B. N. A.) 662, in both of which interstate movement of gasoline was held to have ceased at a local storage facility.

The decision of the court below that storage at the Marine Terminal did not end the interstate movement because of the ability of the petitioner to predict with some degree of accuracy its customers' fluctuating demands for gasoline in the locality is, we believe, in conflict with the reasoning of this Court in *Walling* v. *Jacksonville Paper Co.*, 1943, 317 U. S. 564, 569, 570, and with decisions of other courts of appeals: the First Circuit in *Domenech* v. *Pan American Standard Brands, Inc.*, 1945, 147 F. 2d 994; the Tenth Circuit in *Jewel Tea Co.* v. *Williams*, 1941, 118 F. 2d 202.

It is jurisdictional in this case that "either or any of the purchases" of gasoline by the four jobbers or the 358 service station operators at prices found to be discriminatory were "in commerce" (Section 2(a)). That the purchases "affected commerce" is not enough. *Federal Trade Commission* v. *Bunte Bros.*, 1941, 312 U. S. 349; *Higgins* v. *Carr Bros. Co.*, 1943, 317 U. S. 572. The court below nevertheless cited on this point cases involving statutes wherein the Congress exerted its full power over commerce (R. 5298), *e. g.*, *Stafford* v. *Wallace*, 1922, 258 U. S. 495. It is submitted that the court failed to distinguish between the two lines of cases; see *Polish National Alliance* v. *National Labor Relations Board*, 1944, 322 U. S. 643 at 647.

The question is of outstanding importance to the oil and other industries. Whether or not the bona fide storage of gasoline at a local terminal is analogous in principle to the storage of other kinds of merchandise at a local warehouse should, we believe, be settled by this Court.

IV.

Paragraph 6 of the Order as modified by the court (R. 5305-6) applies only after the jobber has been shorn of all retail operations. It requires petitioner:

> (1) either to cease selling to wholesalers (performing the sole function of wholesaling and not selling at retail) or else to cease selling to retailers in the same locality; or
>
> (2) to sell to wholesalers and retailers in the same locality at the same price, which not only is a practical impossibility but which also disregards the functional difference between wholesalers and retailers; or
>
> (3) to cease dealing with any wholesaler who petitioner knows, or should know, will not maintain petitioner's price to retailers.

Neither the courts nor the Commission in any other case have required suppliers to distribute solely by wholesale or solely by retail; nor to charge the same price to wholesalers and retailers; nor to establish price maintenance systems.

Whether the Commission may order suppliers to control resale prices by selection of complaisant wholesalers is an innovation of dubious legality. *Federal Trade Commission* v. *Beech-Nut Packing Co.*, 1922, 257 U. S. 441.

The court below, denying petitioner's contention that interstate commerce ended with storage at the Marine Terminal, held that interstate commerce came to an end when the petitioner disposed of its gasoline to its customers (R. 5297). The jurisdiction of the Commission must end where interstate commerce is found to end; yet Paragraph 6 as modified permits the Commission, through petitioner as an enforcing agency, to exercise jurisdiction over the price of gasoline after its interstate movement was held to have ended and therefore over wholesalers

who, the court held, were not engaged in interstate commerce.

Conclusion.

It is respectfully submitted that this case calls for the exercise of the supervisory powers of this Court and that the writ should be allowed.

Respectfully submitted,

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